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January 21, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

RE: MM Docket No. 92-266

Dear Mr. Caton:

On January 21, 1994, Daniel Brenner of the National Cable Television Association wrote to William Kennard, Office of the General Counsel regarding the above captioned docket. Correspondence is attached.

Sincerely,

Daniel L. Brenner

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National Cable Television Association

January 21, 1994

Delivered by Hand

William E. Kennard, Esquire
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Re: Pre-emption of State Regulation of "Negative Option Billing"

Dear Mr. Kennard:

The Commission is re-examining various aspects of the rate regulation regime it has adopted pursuant to the Congressional mandate embodied in the 1992 Cable Act. I am writing to reiterate the National Cable Television Association's support of the Commission's decision to pre-empt state and local laws attempting to prohibit certain cable operator marketing practices which are permitted by federal law, including offering channels on a per channel "a la carte" basis or in discounted packages comprising such channels.

Commission pre-emption of state or local regulation of "negative option billing" practices is consistent with -- indeed, compelled by -- the 1992 Cable Act. Federal pre-emption of inconsistent state or local "negative option" regulation is required with respect to both pre-September 1, 1993 tier restructuring to bring cable offerings into compliance with the 1992 Act and post-September 1, 1993 packaging of offerings that do not constitute negative options under federal law.

In its First Order on Reconsideration, the Commission affirmed that "franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act." It continued: "In particular, local authorities are precluded from regulating negative option billing to prevent tier restructuring regardless of how the local requirement is characterized."[1] This conclusion is consistent with long-standing Commission policy as well as the mandate of the 1992 Cable Act.

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1 First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking in MM Docket 92-266, FCC 93-428, released August 27, 1993, ___ FCC Rcd ___ at ¶ 86 n.127 (citation omitted).

Since 1984, with the addition of Title VI to the Communications Act of 1934, the Act has required that, with an exception not here relevant, "any provision of law of any State, political subdivision, or agency thereof . . . which is inconsistent with this Act shall be deemed to be pre-empted and superseded." 47 U.S.C. § 556(c).[2] Even prior to the adoption of Title VI, the Commission pre-empted state or local efforts to regulate cable marketing practices, including "packaging [of] services, at appropriate prices, to meet consumer demand in a myriad of localities featuring different combinations of competitive video alternatives." Community Cable TV, Inc., 95 FCC 2d 1204, 1217, recon. 56 RR 2d 735 (1984). The Supreme Court decision in Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984), affirming the Commission's broad pre-emption authority over state attempts to regulate cable operations, referenced the Community Cable TV case and other Commission decisions pre-empting state regulation of "non-broadcast" cable services. Id. at n.11.

With respect to cable rate regulation in general and negative option billing practices in particular, Congress has clearly indicated the supremacy of the federal interest. The 1992 Act mandates that the FCC adopt a comprehensive regime of rate regulation. See Section 3 of the 1992 Cable Act, 47 U.S.C. § 543. While rates for basic service in cable systems not subject to "effective competition" are subject to regulation by municipal authorities, the municipalities must abide by FCC-adopted regulations in doing so. Local government may not adopt different rules relating to rate regulation under the guise of consumer protection lawmaking.

More significantly, rates for "cable programming services", a term that is statutorily defined to mean all video programming services except those included in the basic tier or offered on a per channel or per program basis, are subject to exclusive regulation by the FCC. See 47 U.S.C. § 543(c)(1)A). Finally, program services that are "offered on a per channel or per program basis" are expressly excluded from the definition of "cable programming services", and therefore, by statutory mandate, are exempt from rate regulation at any level. See 47 U.S.C. § 543(c)(1)A).

These and other provisions of the 1992 Cable Act indicate that Congress intended that the federal government fully occupy the field of cable television rate regulation, except with respect to a franchising authority's regulation of basic tier rates pursuant to FCC-adopted rules. See 47 U.S.C. § 543(a)(1) ("No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section.")

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[2] Another provision of the Act, which appears in a section dealing with customer service and construction-related requirements, provides that "[n]othing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically pre-empted by the subchapter". 47 U.S.C. § 552(c). The state laws at issue herein are not customer service or construction-related requirements and, even assuming they are correctly characterized as "consumer protection laws," are specifically pre-empted by the rate regulation and negative option billing provisions of Title VI.

Included in the 1992 Cable Act's exclusive frame of rate regulation is consideration of so-called "negative option" practices:

> "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment." 47 U.S.C. § 543(f).[3]

Accordingly, the language of the 1992 Act plainly reflects Congress' intent to occupy the field with respect to rate regulation in general and so-called negative option billing practices in particular. By dealing specifically with such marketing practices, Congress clearly meant to pre-empt inconsistent state or local laws. There is no gap in the statute's consideration of marketing practices that may involve negative options, no space reserved for the states to provide local input under the broad rubric of "consumer protection."

Congress need not require the Commission to adopt regulations in a particular area nor explicitly mandate federal pre-emption in order for the Commission to pre-empt local regulation. The Supreme Court has affirmed FCC pre-emption of local regulation of technical standards pursuant to provisions in the 1984 Cable Act which stated that the Commission "may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." City of New York v. FCC, 486 U.S. 57, 61 (1988) citing 47 U.S.C. § 544(e). Indeed, the Commission declined to specify technical standards, but federal occupation of the field under the Cable Act nonetheless prevented state or local regulation to fill in a purported regulatory gap.

Here, the FCC has not forborne regulation but is actively enforcing negative option rules, as demonstrated by the letters of inquiry referenced to supra, the very first enforcement action taken by the FCC under the 1992 Act. There is thus even less of a case to be made for state regulation where the FCC is actively occupying the field reserved to

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[3] In its initial rate regulation Report and Order, the FCC implemented this provision of the statue by regulation. That regulation provides as follows:

> "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude [1] the addition or deletion of a specific program from a service offering, [2] the addition or deletion of specific channels from an existing tier of service, or [3] the restructuring or division of tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations." 47 C.F.R. § 76.981.

the FCC by Congress. And in the FCC's technical standards preemption, there was no broader statement of preemption in the statute than is found in the instant situation.

Not only do the explicit statutory provisions of the 1992 Cable Act support the Commission's decision to pre-empt inconsistent state or local regulation of negative option practices, but so too does the Act's legislative history. The Senate Report on the 1992 Cable Act comments specifically on the exemption from rate regulation of services offered on a per channel basis. The Report states that that exemption demonstrates Congress' "belief that greater unbundling of offerings leads to more subscriber choice and greater competition among program services." S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991). The Report continues: "[T]hrough unbundling, subscribers have greater assurance that they are choosing only those program services that they wish to see and are not paying for programs they do not desire." Id. The Senate Report not only makes clear that unbundling offerings and providing them on a per channel basis is in the public interest, but it also plainly states that that result serves a primary objective of the Act:

> "In sum, one of the prime goals of the legislation is to enhance subscriber choice. Unbundling is a major step in this direction. Cable operators and programmers are urged to work toward this objective, while also seeking to accomplish other legitimate goals." Id.[4] (emphasis added).

State regulation that is more restrictive than the FCC's would frustrate the accomplishment of this "prime goal" of the legislation. If the FCC permits certain marketing activities yet states are free to prohibit those very activities, Congress' intent to achieve this "prime goal" is evidently disobeyed.

Consistent with this Congressional guidance, the Commission correctly concluded that per channel or per programming services that are exempt from rate regulation may be offered as a discounted collective offering or "package," so long as two requirements are met. The Commission concluded that "regulation of collective offerings of otherwise exempt 'a la carte' services would not serve the purposes of the Cable Act", and, in fact, "might be counterproductive" because cable operators "likely will refrain from making such offerings." Id. ¶ 329.[5] The FCC specifically concluded that "cable operators should be free to offer collective offerings at a combined price which is less than the sum of the charges for the individual services," because "such discounts benefit the consumer".

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[4] In echoing these concerns, the Commission observed that "the rationale underlying Congress' decision to exempt from regulation per channel or per program services offered on a stand-alone basis" was that "greater unbundling of offerings leads to more subscriber choice and greater competition among program services." Report and Order, ¶ 327.

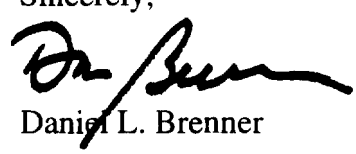
[5] First, "the price for the combined package must not exceed the sum of the individual charges for each component service." Report and Order ¶ 327. Second, "the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the collective offering." Id. ¶ 328.

Most significantly the Commission observed that permitting such discounted collective offerings was entirely "consistent with the rationale underlying Congress' decision to exempt from regulation per channel or per programming services offered on a stand-alone basis" -- i.e., the promotion of "more subscriber choice". Id. ¶ 327. Again, state law, under the rubric of "consumer protection" or otherwise, that contradicts what the FCC allows will simply undo the Commission's faithful implementation of the stated goals of the Act, including the "prime goal" of permitting a la carte offerings.

Given expressed Congressional intent to pre-empt state rate regulation inconsistent with federal law, to permit (and indeed encourage) the unbundling of cable channels, to eschew regulation of per channel offerings and to require the federal government to define and regulate negative option practices associated with cable offerings, the Commission should not retreat from its well-grounded conclusion that local or state regulation of alleged "negative option" practices is pre-empted to the extent those practices are permitted by federal law.

For these reasons, the Commission has sound legislative support for determining that state and local laws inconsistent with federal negative option requirements must be pre-empted. It should expeditiously reaffirm that decision.

Sincerely,



Daniel L. Brenner

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